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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. AARON AGUIRRE, Defendant and Appellant.	B217624 (Los Angeles County Super. Ct. No. TA093312)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald V. Skyers, Judge. Affirmed.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Blythe J. Leszkay and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Aaron Aguirre challenges his conviction of attempted murder and use of a firearm, causing great bodily injury, asserting a dozen assignments of error, including insufficient evidence that he was the shooter, harbored an intent to kill, or caused the victim great bodily injury. Defendant also contends that the trial court erred in denying his motion for new trial, based upon newly discovered evidence, and upon ineffective assistance of counsel due to six alleged errors of counsel.[1] Defendant also contends that the prosecution suppressed evidence material to the issue of guilt, and that counsel was ineffective in her summation. We reject each of defendant's contentions, and affirm the judgment.

BACKGROUND

1. Procedural Background

Defendant was charged with attempted willful, deliberate, premeditated murder. The information specially alleged that in committing the crime, defendant personally used a firearm and personally and intentionally discharged it, causing great bodily injury to the victim, Edgar Ayala (Ayala), within the meaning of Penal Code section 12022.53, subdivisions (b), (c), and (d).[2] It was also alleged that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang, in violation of section 186.22, subdivisions (b)(1)(c) and (b)(4).

A jury convicted defendant as charged, and found the special allegations to be true. Defendant brought a motion for new trial, alleging insufficiency of the evidence, ineffective assistance of counsel, and newly discovered evidence which was denied after hearing defendant's testimony and considering supportive declarations.

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[1] Defendant also filed a petition for writ of habeas corpus, alleging ineffective assistance of counsel. The petition is now pending in this court as *In re Aaron Aguirre*, No. B226523. Concurrently with the filing of this opinion, we deny the petition in a separate order.

[2] All further statutory references are to the Penal Code unless otherwise stated.

Defendant was sentenced to life in prison with the possibility of parole, plus 25 years to life under section 12022.53, subdivision (d). The remaining enhancements were stayed. Defendant filed a timely notice of appeal.

2. Prosecution Evidence

Ayala testified that his life was in danger from other gang members for testifying against another gang member. He had been convicted of misdemeanor theft and joyriding, and was in custody at the time of trial. He was placed in the jail's "green light" module, meaning protective custody.

Ayala identified defendant in court as the person who shot him on June 24, 2007, at approximately 3:30 p.m., just after he had come out of his girlfriend's apartment building onto Orange Avenue. Ayala testified that he heard gunshots, 12 in all, and one bullet struck his leg. When he looked in the direction of the shots, he saw a white car, moving slowly away from the curb, and recognized defendant's body halfway outside the car window right after the shooting, as it moved away on Orange Avenue. The car was about 24 feet away when the shooting began. He had known defendant since elementary school.

Claiming that he removed the bullet himself with his fingers, Ayala testified that after Sheriff's deputies arrived, he was taken to the hospital, where he remained for approximately two hours. He showed the jury the scar on his left calf, near his knee.

Ayala testified that defendant was a member of the San Street gang that his gang name was "Spooky," and that defendant had a San Street tattoo on his arm. Ayala described Spooky as bald and *huero*, meaning light-skinned in interviews with deputies at the scene and in the hospital. He also told the deputies that defendant had been sitting in the front passenger seat of a white car, and that there had been four other males in the car.

Ayala recognized two other occupants of the white car. One was Jose Perez (Perez), a San Street gang member whose gang name was "Chino," and the other was Guillermo Tejeda (Tejeda), whom he knew as "Memo." Two days after the shooting, Detective Gabriela Herrera, showed Ayala two six-pack photographic lineups. Ayala

identified defendant as the shooter in the first photo array, and identified Perez as having been in the backseat of the car behind defendant. Ayala told Detective Herrera that Perez and Tejeda were both San Street gang members, and that he had known them both since childhood.

After he denied that he was a member of the Compton Vario Segundo (CVS) gang, Ayala denied that he had friends or relatives who were gang members, other than a deceased uncle. He admitted associating with gang members and having "claimed" the gang in the past, but when he could not articulate the difference between claiming and belonging to a gang, he admitted that he had been lying. Ayala grew up in Paramount, which both CVS and its rival Vario San Street claimed as its territory. Prior to being shot, Ayala knew the two gangs were not getting along.

Sheriff's Deputy Imelda Cervantes and her partner arrived at the scene of the shooting shortly afterward, and spoke to Ayala, who said that "Spooky," a *huero* with tattoos from San Street, had shot him. Deputy Cervantes testified that she observed a graze injury beneath Ayala's left knee and that he told her that after he heard 8 to 10 gunshots, he took cover behind some pillars near the entrance gate of the nearby apartment building. Ayala claimed that he could not describe anyone else in the car. Deputy Cervantes testified that she recovered several bullet fragments, and a bullet casing was given to her at the scene by an unknown male who said he had found it somewhere in the area.

Detective Stacy Morgan testified that several weeks before the shooting, she and her partner investigated another shooting in Paramount in a RV trailer in the backyard of a house, where defendant had been with his father and Marlene Baltazar (Baltazar). Defendant and his father were not hit, but Baltazar suffered a gunshot wound to the neck near her left shoulder. Detective Morgan found bullet holes in the garage and RV, and recovered bullet casings from the nearby street. Defendant told them he was a member of the Vario San Street gang.

Detective Herrera testified as both the investigating officer and gang expert. She interviewed Ayala two days after the shooting and he told her he heard approximately

12 gunshots just after leaving his girlfriend's apartment on Orange Avenue, and that he saw a white Ford automobile. Defendant was leaning half his body out the front passenger window as the car travelled northbound. Perez, a member of the Vario San Street gang was seated behind defendant.

In October 2007, Detective Herrera interviewed defendant at which time he admitted to her that he had been a member of Vario San Street from an early age, and that his gang moniker was "Spooky." Defendant denied involvement in the shooting but said that his "homies" Perez and Tejeda had told him about it. Defendant claimed that his homies had shot Ayala in retaliation for the shooting of his girlfriend, Baltazar, because they believed that Ayala's gang, CVS, was responsible. Defendant denied that he aided or encouraged the shooters. When Detective Herrera asked defendant where he was the day of the shooting, he became upset and yelled, "I don't know." He said nothing about observing the shooting from a second car, nor did he claim that he had been to a cemetery that day.

Detective Herrera testified regarding her gang expertise and about gang culture. She explained monikers and how gang members earn respect from fellow gang members and rival gangs by committing crimes that benefit their gang. She testified that she had investigated crimes involving both CVS and San Street, and was familiar with other deputies' reports about crimes involving San Street members. She had executed search warrants on San Street members' homes, and during those searches, she found gang photographs and writings. San Street was composed of approximately 39 members, and its territory was in the City of Paramount. San Street was an extremely violent and dangerous gang, whose members committed crimes from murder to robbery, shootings, burglaries, vehicle theft, and vandalism, especially by tagging its initials, "S.S.T."

The detective also testified that San Street's rivals included CVS, which had originated in Compton, in an area adjacent to Paramount. Now, many of its members lived in San Street territory. Detective Herrera testified that both gangs were very violent, with members committing murder, attempted murder, vandalism, shootings,

street robberies, and car thefts. The two gangs were often at war. Detective Herrera produced evidence of the conviction of a San Street member who, with two other San Street gang members, had shot a person they believed to be a member of CVS.

Detective Herrera opined that defendant was a member of the Vario San Street gang and his moniker was "Spooky," and that Ayala was a member of CVS. Detective Herrera had reviewed the reports of the shooting, spoken to Ayala, and was familiar with the facts of the earlier shooting of Baltazar. She explained that because shooting a woman was not tolerated in gang culture, gang members would retaliate against those believed to have been responsible, in this case CVS. Detective Herrera further opined that San Street members targeted Ayala because of his association with CVS and that the instant crime was committed for the benefit of Vario San Street, because shooting a rival gang member would enhance the shooter's status within the gang, as well as the gang's reputation, by causing fear and intimidation.

Under cross-examination, Detective Herrera agreed that she had not contacted all the witnesses defendant mentioned, but she did talk to Perez after defendant told her that he had confessed to the crime, but Perez denied any culpability. Defendant also claimed that Tejeda confessed to him, but Detective Herrera did not contact Tejeda.

3. Defense Evidence

Defendant called several witnesses in his defense, including Ayala, who denied that he took cover when he heard the gunshots, and denied that he told the deputies that he had, explaining that there was nowhere to hide. Though Ayala recalled speaking to Detective Herrera, he denied that he told her that he had run or fallen. Ayala testified that it was defendant, not Tejeda or Perez, who shot him.

David Martinez (Martinez) testified that defendant was a friend, who he had known for about five months prior to the shooting. On that day, Martinez was with defendant and other friends at a cemetery in Long Beach, visiting the grave of "Droopy," who had recently been shot. Others present were Valerie, "Minor," "Husky," "Ghost," "Demon," Jesus Ortega (Ortega), and Perez, all members of San Street. They left the cemetery in two cars. Martinez left in Perez's white Regal,

which defendant drove, because Perez did not have a driver's license. Valerie was in the front next to defendant, and Martinez was in the back, with Minor and Ortega. Everyone else left in a white Ford.

Martinez's group was going to drop Valerie off in Compton, and somehow ended up on Orange Avenue behind the white Ford, when Martinez heard gunshots, saw a gun extended from the window of the white Ford, and then saw it being retracted into the car, which did not slow down. Martinez could not tell who had the gun. He then saw someone holding his leg as though he had been shot. Martinez testified both that the white Ford was in front of them when the shots were fired, and also that the Ford was behind them. Martinez claimed that he and his friends were all shocked, but continued on, dropped off Valerie, and went their separate ways.

Sometime later, defendant contacted Martinez with the news that defendant had been arrested, was in jail, and had been accused of the shooting. Defendant asked Martinez to testify, so he met with defense counsel and the defense investigator. The detective did not contact him until a few minutes before this testimony.

Ortega, who was one of the party at the cemetery and in the white Regal, testified largely as had Martinez, but consistently claimed that the Ford was in front of the Regal. Ortega also saw the gun come from the white Ford, but could not tell whether the gun came out of the front seat or backseat. He saw Ayala grab his leg and run toward the apartment building. Just before the shots were fired, Ortega had observed Ayala standing near the apartment building with another man who looked like a gang member. They were facing the street, talking, and "threw" gang signs to the white Ford.

Ortega denied and then admitted going by the name "Bullet." He denied being a San Street member or "hang[ing] out" with its members, other than defendant, and then admitted that he had. He claimed that he had never heard that defendant's girlfriend had been shot.

Ortega testified that no sheriff's deputy had tried to talk to him before the day of his testimony, when he met with defense counsel, Detective Herrera, and the prosecutor.

Defendant had contacted him about testifying, and he gave a statement in March 2008, when he met with the defense investigator and defense counsel.

Deputy Cervantes, called by the defense, testified that she and her partner, Deputy Garcia, interviewed Ayala together. When Deputy Garcia asked who shot him, Ayala told them that "Spooky" had shot him, and then he described "Spooky." Deputy Garcia had had prior contacts with "Spooky," knew him to be defendant, and knew his gang. When Deputy Garcia asked Ayala whether "Spooky" had a tattoo, he said yes and described it, but did not say that he saw it on the shooter. Deputy Cervantes wrote in her report: "Spooky has a tattoo on his arms, which in block letters says S–S–T."

4. Motion for New Trial

Defendant's motion for new trial was based on defendant's testimony and declarations submitted in support of the motion. Defendant testified that after his trial counsel, Cynthia Legardye, was appointed to represent him, she came to the jail to meet with him approximately three times prior to trial. He told her he wanted to testify at trial, and although she said that he could, she did not prepare him to testify, and did not put him on the stand. On the second day of trial, he again asked to testify. Legardye replied by asking why he did not "call the cops and tell them what happened?" When he did not respond, Legardye became angry and said, he would "f—k everything up because [he] didn't respond quick enough." She then walked out and did not allow him to testify.

Defendant did not know he had the right to testify, and claimed that he did not recall the judge telling him this during jury selection, although he remembered that the judge informed him of his right not to testify. At the time of jury selection, defendant thought that Legardye would put him on the stand, because she asked the jurors whether they wanted to see him testify, and some of them said that they did.[3]

Defendant told the court that he would have testified that he did not shoot Ayala, and that Tejeda and Perez fired the shots. He acknowledged that he did not tell this to

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[3] Voir dire was reported, but not transcribed.

Detective Herrera when she interviewed him, and did not initially tell her that he was "Spooky" from San Street. Defendant had no felony convictions.

In support of the motion for new trial, defendant submitted his own declaration, as well as the declarations of others. Defendant's declaration included many of the facts to which he later testified at the hearing on his motion, including his desire to testify, his attorney's angry refusal, and his claim that he did not know he had a right to take the stand, claiming that the judge did not tell him.

In his declaration, defendant stated that he did not shoot Ayala, and that prior to the day of the shooting, he had not seen the friends with him at the cemetery for about six months. Defendant drove Perez's white Regal, because Perez did not have a driver's license. Valerie, Martinez, Ortega, and Minor were in the car with him when they left the cemetery, intending to drop off Valerie. In the white Ford were Tejeda, Perez, and others. Defendant stated that in the area of Orange Avenue, he saw Perez and Tejeda shoot, and defendant continued driving.

Defendant further stated that while in jail, he attempted a three-way telephone call with Detective Herrera, in order to tell her that Perez and Tejeda were the shooters. He told Legardye about Perez and Tejeda during one of her jail visits, but he did not believe that she attempted to contact or subpoena them. He was afraid to name his friends as the shooters, but was not prepared to take the blame for something he did not do.

Defendant stated that "around the time" of the shooting, he was working and going to school, and did not have a shaved head. The photographs attached to defendant's declaration were taken "around" that time.

Phillip Ashley (Ashley), a 38-year resident of the neighborhood, provided a declaration that he had been riding his bicycle on Orange Avenue at the time of the shooting, and saw a white car weaving in and out of traffic. He saw a passenger in the white car stick his hand out the window, and then heard two gunshots. He saw two other people in the car. Ashley also saw another white car, this one driven by defendant, who was pointing in Ashley's direction. Though he tried to speak to law

enforcement on the scene, he was told that they had witnesses, and he should go about his business. Ashley did not know that defendant was in custody until a week before making his declaration in January 2009.

DISCUSSION

I. Substantial Evidence of Attempted Murder

Defendant contends that his conviction of attempted murder was not supported by substantial evidence.

When a criminal conviction is challenged as lacking evidentiary support, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*Ibid*.) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181 (*Young*).)

A. Identification Evidence

Defendant acknowledges that the evidence was sufficient to show that he had a retaliatory motive to shoot a rival gang member, but contends that there was no substantial evidence that he was the shooter, because Ayala was not a credible witness. He argues that Ayala was not worthy of belief, because the circumstances surrounding his observations were not elicited at trial, he testified inconsistently, he lied to the police, and he lied in his testimony, both at the preliminary hearing and at trial.

Defendant points to Ayala's failure to testify that he had seen the actual shooting, or that he had seen defendant holding a gun.[4] Further, Ayala told the deputies that he ran after being hit, but he testified in court that he stood still. Defendant also points to Ayala's testimony at the preliminary hearing that there were people nearby when he was shot, and that he recognized no one except defendant, whereas at trial, he testified that he was not with anyone at the time, and that he saw Perez and Tejeda in the car. Finally, Ayala denied that he was a gang member, whereas Detective Herrera testified that he was an active member of CVS, and that he was shot in retaliation for his gang's shooting of Baltazar.

In reviewing the evidence, "'we must accord due deference to the jury's resolution of a witness's credibility, and not substitute our own evaluation. . . .' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We may not reject Ayala's testimony simply because he was not a credible witness or because there were conflicts and inconsistencies in his testimony; we would first have to conclude that his testimony was physically impossible or inherently improbable. (*Young, supra*, 34 Cal.4th at p. 1181.) Testimony is inherently improbable only when the falsity of the testimony is apparent without resort to inferences. (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.)

It was within the province of the jury to believe and accept any portion of Ayala's testimony and disbelieve the remainder, and we must accept "that portion which supports the judgment . . . , not that portion which would defeat, or tend to defeat, the judgment. [Citations.]" (*People v. Thomas* (1951) 103 Cal.App.2d 669, 672.)

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[4] Defendant contends that Ayala testified at the preliminary hearing that he did not turn around until after all 12 shots had been fired and he had been hit, and thus did not necessarily see who had fired. Defendant argues that under such circumstances, and because the prosecution did not specifically ask Ayala whether he saw a gun, Ayala's claim that defendant was the shooter should be disbelieved. These facts were not before the jury. Moreover, we do not perceive the events as having occurred in successive, separate moments, as defendant suggests. Ayala testified that he heard the shots, immediately felt the bullet that struck him, and turned around. A jury could reasonably infer that the events were simultaneous.

Nothing in the evidence suggests that it was physically impossible that defendant was the shooter, and no inherent improbability appears in Ayala's identification testimony. Defendant was there. His girlfriend had been recently shot in an apparent drive-by, which not only provided a motive for defendant's gang to retaliate against a member of a rival gang, as Detective Herrera explained, it also provided defendant with a personal motive. Ayala's false denial that he was a member of a criminal street gang gave the jury reason to disbelieve everything he said, but did not establish that his identification of defendant was false, without resort to inferences. We must therefore accept the jury's resolution of any conflicts in Ayala's testimony. (*Young*, *supra*, 34 Cal.4th at p. 1181.)

We conclude that substantial evidence to support the verdict may be found in Ayala's unwavering identification of defendant--whom he had known since childhood--as the shooter, particularly in view of the threat to his personal safety for giving testimony against a gang member; in defendant's admitted presence at the scene; and in the motive of his gang and his personal motive to retaliate against Ayala's gang.

B. Intent to Kill

Defendant contends that the evidence of his intent to kill Ayala was insufficient to sustain his conviction of attempted murder.

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citation.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623.) An intent to kill means express malice, which is the desire that one's act result in death or the substantial certainty that it will do so. (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).) Because there is rarely direct evidence of intent, the defendant's mental state must usually be inferred from his acts and the circumstances of the crime. (*Id.* at p. 741.)

Defendant argues that his conviction must be reversed because the evidence did not "conclusively" demonstrate "a definite and unambiguous" or "unequivocal" intent to kill. In suggesting such a strict standard of review, defendant relies in part upon a jury instruction, CALCRIM No. 600, which does not abrogate the ordinary substantial

evidence standard of review. It merely instructs the jury that a direct step toward killing another person "indicates a definite and unambiguous intent to kill."

Defendant also relies in part on *People v. Ratliff* (1986) 41 Cal.3d 675, and *People v. Lee* (1987) 43 Cal.3d 666, in which the California Supreme Court did not abrogate the ordinary standard of review, but merely reviewed the evidence for harmless error--not substantial evidence. (*Ratliff*, at pp. 695-696; *Lee*, at pp. 768-769.) Harmless error is not at issue here. Thus, rather than examine the record for conclusive, unambiguous, or unequivocal evidence of an intent to kill, we apply the traditional standard of review by examining the whole record for sufficiently reasonable and credible evidence of such solid value as to permit a reasonable trier of fact to find that element beyond a reasonable doubt, drawing all reasonable inferences in favor of the judgment and accepting the credibility determinations of the jury. (*Smith, supra,* 37 Cal.4th at pp. 738-739.)

Defendant compares the facts of this case with those of *People v. Lashley* (1991) 1 Cal.App.4th 938 (*Lashley*), which upheld a finding of intent to kill, based upon evidence of a prior threat, the fact that the defendant aimed at the victim, and the severity of the victim's injuries. Defendant's purpose in making the comparison is unclear, but he argues that because his actions were dissimilar, the only reasonable inference was that he merely intended to frighten or injure Ayala. As the *Lashley* court made clear, however, there is no single method of proving an intent to kill, and the facts of that case were not the exclusive means of doing so. (*Id*. at p. 945.) Thus, the comparison is not helpful. "In reviewing sufficiency of evidence claims, each case of necessity must turn on its own particular facts. [Citations.]" (*Smith, supra*, 37 Cal.4th at p. 745.)

"'The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." [Citation.]' [Citations.]" (*Smith, supra*, 37 Cal.4th at p. 741.) Defendant argues that the evidence did not show that he fired toward Ayala, because only one of several rounds hit him, and it hit him in

a nonvital spot. We disagree. The jury could reasonably infer that defendant fired in Ayala's direction from evidence that the car came close to the curb of the sidewalk where Ayala stood, and one of the bullets hit him. Missing the target does not negate the inference of the defendant's intent to kill: "'"[T]he fact that the victim may have escaped death because of the shooter's poor marksmanship [does not] necessarily establish a less culpable state of mind." [Citation.]' [Citation.]" (*Ibid*.)

Defendant points out that Ayala contradicted himself regarding the number of shots he heard and defendant's distance when firing, estimating the distance at 50 feet during the preliminary hearing and 24 feet at trial. We reject any suggestion in defendant's argument that such contradictory evidence should be considered substantial. The preliminary hearing testimony was not before the jury, and in any event, the jury was entitled to believe one version and reject the other. (*People v. Williams* (1992) 4 Cal.4th 354, 364.)

Moreover, assuming that the distance was somewhere between 24 and 50 feet, the precise measurement would make no difference. Evidence of a motive and firing from a slow moving car toward a person or persons from a distance of 60 feet is enough to permit a rational trier of fact to conclude that the shooter acted with an intent to kill. (*People v. Perez* (2010) 50 Cal.4th 222, 224, 230 (*Perez*).) Here, as in *Perez*, defendant fired from a slow moving car and had a motive for the shooting. Defendant had a personal and gang related motive to retaliate against the CVS gang and its members for the shooting of his girlfriend. We conclude that such evidence was sufficient to permit a rational trier of fact to conclude that defendant acted with an intent to kill. (See *Perez*, at p. 230; *Smith, supra,* 37 Cal.4th at p.741.)

II. Motion for New Trial based upon Ineffective Assistance of Counsel

Defendant's motion for new trial was based in part upon the alleged ineffective assistance of counsel. Defendant contends that the trial court erred in denying the motion.

Although ineffective assistance of counsel is not one of the statutory grounds for a new trial, "the statute should not be read to limit the constitutional duty of trial courts

to ensure that defendants be accorded due process of law. 'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.' [Citations.]" (*People v. Fosselman* (1983) 33 Cal.3d 572, 582; § 1181.)

We independently review the trial court's decision to deny the motion for new trial. (See *People v. Ault* (2004) 33 Cal.4th 1250, 1262 (*Ault*); *People v. Albarran* (2007) 149 Cal.App.4th 214, 224.)[5] However, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

The Sixth Amendment right to counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*); see also Cal. Const., art. I, § 15.) "Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126 (*Rodrigues*).) The reasonableness of an attorney's performance is measured under prevailing professional norms. (*Strickland*, *supra*, 466 U.S. at p. 688.)

Defendant sets forth nine alleged errors committed by trial counsel. Defendant does not contend that each of counsel's alleged errors was prejudicial. Instead, he contends that the cumulative effect of the errors was to deny him a fair trial. Thus, we

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[5] Relying on *Ault*, respondent contends that both the grant and denial of a motion for new trial are reviewed for an abuse of discretion. However, in that case, the California Supreme Court explained that because different considerations apply, "the reviewing court must determine for itself whether errors denied a fair trial to the party against whom the judgment was entered." (*Ault*, *supra*, 33 Cal.4th at p. 1262, fn. omitted.) Independent review has been afforded particularly in cases where the new trial motion was based upon an alleged constitutional violation, such as the right to an impartial jury. (*Ibid*.)

discuss each alleged error before turning to the probability of a more favorable result absent the errors. Our review of trial counsel's performance is deferential. (*In re Cudjo* (1999) 20 Cal.4th 673, 692.)

A. Failure to Refute Great Bodily Injury Allegation

Defendant's motion for new trial was based in part on the contention that trial counsel had been ineffective by failing to obtain or present medical records to refute the allegation that the victim suffered great bodily injury.

Deputy Cervantes testified that she observed a graze injury beneath Ayala's left knee. Ayala had removed the bullet himself with his fingers, before he was taken to the hospital, where he remained for only two hours. Ayala was left with a scar on his left calf, near his knee, but he did not testify that he suffered any lingering pain or disability. This evidence adequately showed the nature of the injury, and defendant has not shown that medical records would have been relevant. The failure to submit irrelevant or inadmissible evidence does not fall below an objective standard of reasonableness. (See *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836 (*Szadziewicz*).)

Moreover, defendant asserts, but has not shown, that trial counsel failed to review Ayala's medical records. He did not obtain the medical records for his motion for new trial, or otherwise show that their production would have made a difference. He did not call an expert witness or otherwise show that reasonably competent counsel would have submitted the records into evidence. In sum, defendant has not shown that counsel's representation fell below an objective standard of reasonableness. (*Rodrigues*, *supra*, 8 Cal.4th at p. 1126.) Thus we conclude that the trial court did not err in denying the motion on this ground.

B. Failure to Refute Evidence of Intent to Kill and Premeditation

Defendant contends that trial counsel was ineffective because she failed to call a ballistics expert, whose testimony could have shown that the shooter did not aim the gun at Ayala, and because she failed to cross-examine Ayala adequately about whether he saw defendant shoot the gun or even hold a gun.

Defendant argues here, as he did in his motion, that trial counsel should have cross-examined Ayala more closely as to what he saw and heard, and should have called an expert to testify regarding what type of gun would discharge casings, where its casings would be discharged, how many rounds it would hold, and how quickly it could be loaded.

Because the gun was never recovered, and the casing given to Deputy Cervantes by an anonymous person may or may not have been involved in this case, any expert testimony would have been speculative. Counsel does not render ineffective assistance by refraining from taking futile actions. (*People v. Price* (1991) 1 Cal.4th 324, 387.) Similarly, the failure to make unmeritorious arguments does not make counsel ineffective. (*Szadziewicz*, *supra*, 161 Cal.App.4th at p. 836.)

Defendant's posttrial motion attorney, Adrian Baca, apparently also concluded that ballistics evidence would be unhelpful, as he made a similar decision not to present it at the hearing on the motion for new trial. Baca told the court that he had a ballistics expert standing by, but he then submitted the matter without calling the expert to testify.

C. Perez's Alleged Confession

Defendant contends that trial counsel should have presented evidence that Perez confessed to the shooting. In support of his motion for new trial, defendant submitted the declaration of his sister, Valerie, who stated: "After my brother was arrested, my boyfriend [Perez] talked to me about admitting that he was the shooter. I told him I didn't know what would happen to him if he confessed. He told me that my brother was in a separate car. He felt bad that my brother was in jail for something he didn't do." Valerie claimed that she told her brother this information, but she was never contacted by his attorney or investigator.

Defendant suggests that trial counsel erred, because Valerie's testimony would have been admissible as an exception to the hearsay rule under Evidence Code section

1230.[6] However, defendant made no showing below, and makes no showing here, that Valerie's conversation was admissible. Evidence of third party culpability must be relevant to be admissible. (*People v. Geier* (2007) 41 Cal.4th 555, 581 (*Geier*).) As respondent points out, Valerie gave no date for her conversation with Perez or her brother, other than sometime after defendant's arrest, and there is no reason to assume that the conversations took place prior to defendant's conviction. Thus, defendant has not shown the statements to be relevant to trial counsel's performance.

Further, declarations against penal interest are not admissible under Evidence Code section 1230, unless they are trustworthy. (*Geier*, *supra*, 41 Cal.4th at p. 583.) To determine admissibility, a trial court "'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.]" (*Id*. at p. 584.) Had trial counsel attempted to present the sparse facts in Valerie's declaration, the testimony most certainly would have been excluded as Valerie did not quote or paraphrase what Perez said to her, but merely suggested that he confessed to the shooting.

Moreover, Detective Herrera testified that defendant told her that Perez had confessed, but when she spoke to Perez, he denied it. Without evidence of Perez's words, the circumstances under which he uttered them, or his possible motivation, defendant did not establish the trustworthiness of the alleged confession. (See *Geier*, *supra*, 41 Cal.4th at p. 583.) The failure to submit irrelevant or inadmissible evidence does not fall below an objective standard of reasonableness. (See *Szadziewicz*, *supra*, 161 Cal.App.4th at p. 836.)

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6 Evidence Code section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability, . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

D. Inadequate Impeachment of Ayala

Defendant contends that trial counsel should have done more to impeach Ayala's credibility with the following: (1) Additional evidence, documentary evidence in particular, of Ayala's membership in CVS, as well as expert opinion that falsely claiming membership in a gang can be dangerous; (2) evidence that defendant was not bald at the time of the shooting, as Ayala claimed; (3)(a) Ayala's friendship with Perez, giving him a motive to lie to protect his friend; and (3)(b) Ayala's purported MySpace page that Baltazar claimed to have given trial counsel in court, containing an alleged statement by Ayala that the police had fabricated his identification of defendant as the shooter.[7]

Defendant makes no attempt to show that trial counsel failed to explore the enumerated issues or that reasonable counsel would have presented evidence of them. First, he has not analyzed--or even presented--all the available facts relevant to his contentions. Second, defendant has provided no legal analysis to show that a failure to submit the enumerated evidence on the issue rendered counsel's representation ineffective, or even that reasonable counsel would have done so.

Contrary to defendant's suggestion, there was no shortage of evidence of Ayala's gang membership. Detective Herrera testified that Ayala was a member of CVS, and Ayala essentially admitted that he was a member of that gang. Although he initially denied it, Ayala admitted that he had lied, that he associated with members of the gang, and that he had "claimed" the gang in the past.

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[7] Defendant also contends that the alleged MySpace comments gave trial counsel reason to question more closely the deputies' "suggestive" questioning of Ayala as to the identity of the shooter. As respondent observes, defendant admits in his opening brief that he did not raise this issue in his motion for new trial. A trial court may not grant a new trial on a ground not raised in the motion. (*People v. Masotti* (2008) 163 Cal.App.4th 504, 508.) This new contention thus does not present an issue of reversible error, and we decline to reach it.

Baltazar did not attest, as defendant claims, that defendant had a full head of hair on the day of the shooting. She stated that "[h]e had a full hair style for a year before the shooting." Further, defendant has not shown that trial counsel failed to investigate his appearance on the day of the shooting.

There was no evidence of a friendship between Perez and Ayala, as defendant claims. Ayala testified that he had known Perez since elementary school. He had also known defendant since elementary school, because he, Perez, and defendant all lived in the same neighborhood.

Baltazar's allegation that she gave trial counsel a printout of a MySpace page specified no date. Thus, defendant did not establish that trial counsel had this information. Further, no evidence was submitted to establish the authenticity or reliability of the MySpace page. As respondent points out, there could be no such authentication, unless Baltazar was physically present and watching Ayala at work at his computer.

We conclude that due to his scant factual analysis and the absence of any legal analysis, defendant has failed to meet his burden to show that counsel's representation fell below an objective standard of reasonableness. (*Rodrigues*, *supra*, 8 Cal.4th at p. 1126.)

E. Police Intimidation

Defendant refers to the transcript of an unauthenticated, undated, mostly unintelligible, admittedly inadmissible, and excluded cell phone conversation purportedly between himself and Ayala. Defendant contends that the conversation shows that trial counsel could have, but failed to investigate impeachment and exculpatory evidence of police intimidation.

We disagree. The transcript does not show what trial counsel did or did not do, or what information she had or when she had it.

F. Refusal to Permit Defendant to Testify

Defendant contends that trial counsel rendered ineffective assistance because she did not call him to testify. The trial court accepted defendant's testimony on this issue as true, for the purposes of its determination.

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Strickland, supra,* 466 U.S. at p. 689.)

Defendant has not overcome that presumption. He has not shown that a reasonable attorney would have found his testimony helpful. At the new trial hearing, defendant testified, among other things, that he twice informed counsel of his desire to testify, and on one such occasion, she asked why he did not "call the cops and tell them what happened?" When he did not respond, counsel became angry and left. Although defendant testified that if he had testified at trial, he would have denied shooting Ayala, and would have named Tejeda and Perez, he acknowledged that he did not tell this to Detective Herrera when she interviewed him, and did not initially tell her that he was "Spooky" or a member of the San Street gang.

Defendant has not shown that trial counsel's decision was unreasonable under prevailing professional norms, given his evasiveness with Detective Herrera and his failure to come forward with his eyewitness information.

G. No Counsel Error and No Prejudice Established

It is defendant's burden to establish a reasonable probability that, but for trial counsel's alleged errors, a determination more favorable to defendant would have resulted. (*Rodrigues, supra*, 8 Cal.4th at p. 1126.) Defendant's only argument on this issue is that the cumulative effect of all the alleged errors discussed above denied him a fair trial. Having found that defendant failed to meet his burden to show such errors, we necessarily conclude that he has not shown that cumulative errors adversely affected the outcome of his trial.

III. Motion for New Trial based upon Newly Discovered Evidence

Defendant contends that the evidence contained in the declaration of Ashley, submitted with the motion for new trial, was material and newly discovered. Defendant contends that Ashley's testimony would have exonerated him and bolstered the testimony of defense witnesses Martinez and Ortega.[8]

"In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: """1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."' [Citations.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328 (*Delgado*).)

Defendant has not shown that Ashley's declaration was material. Ashley stated: "4. I saw a car weaving in and out of traffic. I saw a passenger in a white car stick his hand out the window. I immediately then heard two gun shots. I saw two people in this car. The car sped off. [¶] 5. I saw another white car. I saw [defendant] driving this car. He was driving regularly. I saw him pointing in my direction."

Ashley then describes a conversation with defendant's mother that took place the week before making his declaration: "I told her I was there when the shooting happened. [Defendant] never fired a shot that day."

Evidence is considered material if there is a reasonable probability that it would have affected the outcome of the trial. (See *Delgado, supra*, 5 Cal.4th at p. 328.) No such probability appears in Ashley's declaration. Ashley did not state that defendant was *not* the shooter, nor did he state the identity of shooter. Indeed, Ashley did not say that he even saw the shooter.

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8 Defendant contends that Ashley was an impartial witness and had no "apparent" gang affiliation, but there is nothing in his declaration or the record demonstrating his impartiality or his lack of gang affiliation.

Ashley's final sentence, "[Defendant] never fired a shot" appears in a paragraph describing his conversation with defendant's mother, not in the paragraph describing what he actually saw. Not only does Ashley's hearsay statement to defendant's mother fail to show a reasonable probability of a different outcome, it is not """"the best evidence of which the case admits."""" (*Delgado*, *supra*, 5 Cal.4th at p. 328.)

Assuming, however, that Ashley's statement that defendant "never fired a shot" was merely misplaced in the final paragraph, and was, in fact, meant to refer to what he saw, defendant has not shown that Ashley's observation was newly discovered. Ashley stated: "I was there when the cops showed up. They went up to the victim. I saw Deputy Morgan go and talk to some other people. She went back to her patrol car and I tried to talk to her. She said she already had a couple of witnesses. I tried to tell her what I saw. She told me to gone [*sic*] on about my business."

The only newly discovered information described in Ashley's declaration is Ashley's discovery that defendant was in custody. The declaration does not establish that defendant or his attorney were ignorant of Ashley's existence as an eye witness, and it is not probable that Ashley's ignorance of defendant's custody status would render the result different in a new trial. (See *Delgado*, *supra*, 5 Cal.4th at p. 328.) We conclude that defendant did not meet the requirements for a new trial based upon newly discovered evidence, and the trial court did not err in denying the motion.

IV. *Brady*[9] Violation

Defendant contends that Ashley's declaration establishes a discovery violation under *Brady*, because Ashley stated that he tried to tell Deputy Morgan that he had seen the shooting, but she failed to record his name or provide it to the defense.

The suppression by the prosecution of evidence material either to guilt or to punishment results in a denial of due process. (*Brady*, *supra*, 373 U.S. at p. 87.) Law enforcement has a duty to preserve material evidence and to disclose it to the defense. (*California v. Trombetta* (1984) 467 U.S. 479, 488 (*Trombetta*); *People v. Roybal*

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9 *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

(1998) 19 Cal.4th 481, 509-510.) To be material, its exculpatory value must be apparent at the time the evidence is obtained, and the evidence must "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Trombetta*, *supra*, at p. 489; see also *People v. Zapien* (1993) 4 Cal.4th 929, 964 (*Zapien*).) Further, the defendant must show that law enforcement's failure to preserve evidence was done in bad faith. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58; *Zapien*, at p. 964.)

The actions of Deputy Morgan, as described by Ashley, do not show a suppression of evidence, but at most, a failure to collect evidence. Ashley stated that he tried to tell Deputy Morgan what he saw, but she told him to go about his business. He was apparently unsuccessful in offering any evidence that appeared to have exculpatory value, and nowhere in the motion for new trial does it appear that defendant was unable to obtain other eyewitness testimony. Ashley's statement was thus not shown to have been material under the requirements of *Trombetta* and *Zapien*.

Moreover, law enforcement's duty to preserve material evidence imposes no obligation to collect evidence. (*People v. Frye* (1998) 18 Cal.4th 894, 942-943, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Thus, Deputy Morgan's refusal to take Ashley's statement does not require reversal.

V. Ineffective Closing Argument re Great Bodily Injury and Intent to Kill

Defendant contends that trial counsel's representation was ineffective due to a "perfunctory and ineffectual closing argument" that did not adequately demonstrate the weakness of the evidence of intent to kill and the trivial nature of Ayala's wound.

As defendant acknowledges, our review of defense counsel's summation is "highly deferential." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 6.) In considering whether counsel rendered ineffective assistance during closing argument, we again apply the standards enunciated in *Strickland*, *supra*, 466 U.S. 668, and thus "'consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the

outcome. [Citations.]'" (*People v. Gamache* (2010) 48 Cal.4th 347, 391 (*Gamache*).) "'The decision of how to argue to the jury after the presentation of evidence is inherently tactical' [citation], and there is a 'strong presumption' that counsel's actions were sound trial strategy under the circumstances prevailing at trial. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 856 (*Samayoa*).)

As respondent observes, the theory of the defense was that defendant did not fire the shots at Ayala, thus he harbored no intent to kill him and caused him no bodily injury. Defense counsel focused her argument on Ayala's lack of credibility, and his failure to identify others in the car, although he was acquainted with them. She exhorted the jury to find defendant not guilty of all crimes and lesser included offenses.

It is thus apparent that counsel made a tactical choice not to argue that defendant did not intend to kill Ayala or that Ayala's wound was trivial. Such an argument could suggest that defendant did, in fact, fire a weapon and that his actions caused Ayala's wound. Nevertheless, defendant argues that counsel's argument could not be considered "strategic," and "must be attributable to either her ill-preparedness or her ignorance of the law." We may not engage in the presumption defendant urges, as it is his burden to overcome the presumption that counsel's strategy was sound. (*Samayoa*, *supra*, 15 Cal.4th at p. 856; *People v. Freeman* (1994) 8 Cal.4th 450, 498.)

Defendant has failed to show that reasonable counsel, acting under prevailing professional norms, would have argued a different theory. Further, he merely argues, without demonstrating, that he suffered prejudice to a reasonable probability. He has thus failed to meet his burden to establish ineffective assistance of counsel due to her closing argument. (See *Gamache*, *supra*, 48 Cal.4th at p. 391.)

VI. Substantial Evidence of Great Bodily Injury

Defendant contends that the sentencing enhancement imposed pursuant to section 12022.53, subdivision (d), must be stricken because the jury's finding that Ayala suffered great bodily injury was not supported by substantial evidence. The evidence was insufficient, he argues, because Ayala suffered only a minor grazing wound. As discussed above, Ayala testified that he removed the bullet himself with his fingers, was

hospitalized for approximately two hours, and was left with a scar on his left calf, near his knee.

"'[G]reat bodily injury' means a significant or substantial physical injury." (§ 12022.7, subd. (f).) """Whether the harm resulting to the victim . . . constitutes great bodily injury is a question of fact for the jury. [Citation.] If there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding."' [Citation.]" (*People v. Escobar* (1992) 3 Cal.4th 740, 750 (*Escobar*).)

Defendant cites several cases upholding a finding of great bodily injury. (*People v. Wolcott* (1983) 34 Cal.3d 92, 107 (*Wolcott*) [bullet fragments left in calf to "work their way out naturally," no sutures, no blood loss; victim returned to work the next day]; *People v. Miller* (1977) 18 Cal.3d 873, 883 [bullet wounds in chest and arm]; *People v. Lopez* (1986) 176 Cal.App.3d 460, 463, & fn. 5 (*Lopez*) [gunshot wound causing no pain and requiring no medical treatment]; *People v. Sanchez* (1982) 131 Cal.App.3d 718, 733 (*Sanchez*) [multiple abrasions and lacerations]; *People v. Williams* (1981) 115 Cal.App.3d 446, 454 (*Williams*) [torn hymen, intense pain]; *People v. Salas* (1978) 77 Cal.App.3d 600, 606 [broken nose, tooth knocked out].)

Defendant's citation of these cases is apparently meant to suggest that any injury less severe than those enumerated cannot properly be found to be great bodily injury. None of the cited cases so held. "'A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description. Clearly, it is the trier of fact that must in most situations make the determination.'" (*Escobar*, *supra*, 3 Cal.4th at p. 752.)

Defendant also points out that two of the cited cases found support for the jury's finding of great bodily injury, because the injuries were more severe than those in *People v. Caudillo* (1978) 21 Cal.3d 562 (*Caudillo*). (See *Sanchez*, *supra*, 131 Cal.App.3d at p. 733; *Williams*, *supra*, 115 Cal.App.3d at p. 455.) *Caudillo* held that great bodily injury was limited to permanent, prolonged or protracted disfigurement, impairment or loss of bodily function. (See *Caudillo*, *supra*, at p. 581.) However, the

California Supreme Court has disapproved *Caudillo*'s "litmus test for determining great bodily injury." (*Escobar, supra,* 3 Cal.4th at pp. 749-750.) It is thus inappropriate to compare Ayala's injuries with those evaluated under *Caudillo*'s outdated standard. Since *Escobar*, a "'significant or substantial physical injury' need not meet any particular standard for severity or duration." (*People v. Le* (2006) 137 Cal.App.4th 54, 59 (*Le*).)

Defendant cites two cases upholding the jury's finding, in which the injury was not significantly worse than Ayala's, and he attempts to distinguish them by arguing that Ayala's wound was more superficial and his pain was more short lived. In one, the victim felt "fire" when the bullet penetrated and exited her thigh, and there was no evidence of medical treatment, disability, or pain lasting more than a moment. (*Lopez, supra,* 176 Cal.App.3d at pp. 462-463, & fn. 5.) In the other, bullet fragments caused little blood loss, and no sutures were required; the victim remained in the hospital less than a day, and returned to work the next day. (See *Wolcott, supra*, 34 Cal.3d at p. 107.) The comparison to these cases serves only to illustrate that "'"the circumstances might reasonably be reconciled with a contrary finding."' [Citation.]" (*Escobar, supra*, 3 Cal.4th at p. 750.) They do not establish a test to be applied in this case.

The only case cited by defendant in which the injury was found not to support a jury's finding is *People v. Martinez* (1985) 171 Cal.App.3d 727, where the victim felt "'a little stab'" through several layers of clothing, including a heavy coat, resulting in "'a minor laceration.'" (*Id.* at p. 735.) The comparison is not helpful. Ayala's wound was not a cut. A bullet lodged in his leg, necessitated a trip to the hospital, and left a scar.

More analogous to this case are two cases in which the evidence of minor wounds were found sufficient. In *Le, supra,* 137 Cal.App.4th at pages 57-59, the appellate court upheld the jury's finding that a soft tissue gunshot wound amounted to great bodily injury. Similarly, another court upheld a jury's finding that a soft tissue injury with no pain, caused by unextracted bullet fragments, was great bodily injury. (See *People v. Mendias* (1993) 17 Cal.App.4th 195, 201, 206.) It follows from these

cases that a reasonable jury could find that the bullet that lodged in Ayala's leg caused an injury that was neither insignificant nor insubstantial. We are thus bound to accept its finding. (See *Escobar*, *supra*, 3 Cal.4th at p. 750.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST